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No. 451

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IN THE

Supreme Court of the United States

EUGENE A. BOND,
Petitioner,

v.

THE TWIN LAKES RESERVOIR AND CANAL COMPANY, THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, AND THE COLORADO NATIONAL BANK OF DENVER,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF COLORADO

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

Eugene A. Bond, petitioner herein, respectfully petitions this court to issue its Writ of Certiorari directed to the Supreme Court of the State of Colorado and submits the following in support thereof:

Opinion Below

1. (a) The official and unofficial reports of the opinion delivered by the Supreme Court of the State of Colorado in

the above case and in which the parties appeared in reverse order are as follows:

> 155 ? Colorado ... .. (Not Reported), Colorado Advance Sheets for April 5, 1965, Vol. 17, No. 12, Pg. 210; 401 Pacific, 2d. 586.

A copy of the above opinion is appended hereto as Annex 1.

Jurisdiction

2. (b) The grounds on which the jurisdiction of this court is invoked are as follows:

(i) The judgment sought to be reviewed was made and entered in the Supreme Court of the State of Colorado on May 17, 1965, the same being the day upon which said court overruled this petitioner's Motion For a Rehearing on the opinion of the same court announced by it on April 5, 1965, as well as the date of the Remittitur.

(ii) The date of the Order denying the Motion For Rehearing was May 17, 1965, as stated in sub-paragraph (i) above.

(iii) The statutory provision believed to confer on this court jurisdiction to review the judgment in question by Writ of Certiorari is 28 U.S.C. 1257 (3).

(iv) Included here, as well as to be considered under the subject headings of 3 (c) Questions Presented, 4 (d) Constitution and Statutes Involved, and 6 (f) Federal Questions Raised Below, is the question:

> Is the decision of the highest court of a state not in accord with applicable decisions of this Court, construing the meaning and effect of United States Patents granted to homesteaders in 1879, a Federal question of substance and as such reviewable here. Supreme Court Rule No. 19 1 (a).

Questions Presented

3. (c) The questions presented for review are the following:

(i) May the Supreme Court of a State, in the absence of a state statute, or otherwise, restrict patents of the United States issued in 1879 to homesteaders upon lands abutting a non-navigable inland lake to the meander line of such lakes, as established by United States Survey, made in 1876, and referred to in said patents, where such patents themselves contain no such reservation or restriction of terms or other limitation, and in the absence of evidence of any intention of the parties at the time so to restrict or limit said patents, directly contrary to the rule otherwise laid down by this Court in Hardin vs. Jordan (1891) 140 U.S. 371, 35 L. Ed. 423, 11 S. Ct. 863, as well as other cases to the same effect?

(ii) May the same Supreme Court of a State apply the same rules indicated above to selections of that state made under the Internal Improvement Act of Congress of 1841, 43 U.S.C.A. 857 to broader and even less restricted state patents upon such selected lands under the identical fact situations stated above, after the Hardin vs. Jordan supra rule had been established by this Court and recognized by citation and reference thereto by the same State Supreme Court, and likewise in the absence of a State Statute so requiring?

(iii) Does the judgment of a State Court so restricting said United States and State patents to the meander line, in an improvident, advisory and obiter opinion, NOT NECESSARY to the decision in or disposition of the instant case (because the Court later in the same opinion decided that the instant partition case could not be maintained at this time and directed that the lower court Judgment be "reversed".), become the law of such case, and as such, binding upon cotenant parties thereto, if not appealed, in the absence of the United States as a party to such case?

(iv) And, if and only if, Federal Jurisdiction exists because of, or as an incident to, such Federal Jurisdiction

of the foregoing questions, may partition be denied to a cotenant because of an assignable lease upon the interest of one cotenant to the other equal cotenant, (1) silent as to partition and in the absence of express words in such lease waiving the right to partition, or (2) some other agreement surrendering or waiving partition, or (3) some inequitable conduct justifying estoppel, and (4) where partition in kind was made expressly subject to such transferable lease, and (5) contrary to the rule laid down in Willard vs. Willard (1892) 145 U.S. 116, 36 L. Ed. 644, 12 S. Ct. 818?

(v) Reference is made here to paragraph 2 (iv) above.

Constitution and Statutes Involved

4. (d) The case involves the due process of law provisions of the Fifth and Section 1 of the Fourteenth Amendments to the Constitution of the United States relating to deprivation and taking of private property, the title to which had vested long prior thereto.

Reference is made here to paragraph 2 (iv) above.

Material Facts

5. (e) The facts material to the questions presented here are as follows:

Petitioner here, as plaintiff in the trial court, instituted a statutory partition action against his equal cotenant, Twin Lakes Company, and other respondents here, including the trustee bank and the bond holder insurance company, in the District Court of Lake County, Colorado, in April, 1958. The cotenancy property consisting of some two thousand acres of land abutting for some three miles and bordering upon two natural inland non-navigable lakes, herein called Twin Lakes.

United States Patents to the cotenancy property and state selections of other cotenancy property were made in 1879. State Patents thereupon were issued in the eighties. Bond acquired his one-half interest in the cotenancy property in 1931; Twin Lakes acquired its one-half interest in

1950. Reservoir filings upon *public domain* only were made in 1897-98. Construction of Twin Lakes Dams and other structures upon separately owned *non-cotenancy property* occurred about 1900. Easements above the natural level of the lakes, but not upon the beds of the lakes, were obtained from owners of patented property and state property about the same time.

The Amended Complaint alleged that the cotenancy property extended beyond the meander line of the said lakes, as established by United States Survey in 1876 (See sketch map hereinafter and Exhibit 6) and into and upon the beds of said lakes from said meander line to the center or stream of such lakes. The cotenancy property included several lots and tracts of such lands abutting the lakes patented to predecessors in interest homesteaders in 1879; as well as other similarly situated tracts selected by and granted to the State of Colorado under the provisions of the Internal Improvement Acts of Congress of 1841, 43 U.S.C.A. 857, and thereafter patented to predecessors in interest of the equal cotenant parties to this action. In addition to its undivided one-half interest in the cotenancy property, cotenant and defendant Twin Lakes Company, claimed certain rights of way upon public domain by virtue of certain filings made by its predecessors in interest during 1897 and 1898 under the provisions of the Federal Right of Way Act of 1891, 43 U.S.C.A. 941-949. Such rights, under such filings and Act, were confined to Public Domain and the approval thereof by the Secretary of Interior was made expressly "Subject to all valid existing rights". Trial court Final Judgment, paragraph 12, Page 22, folios 236-237.

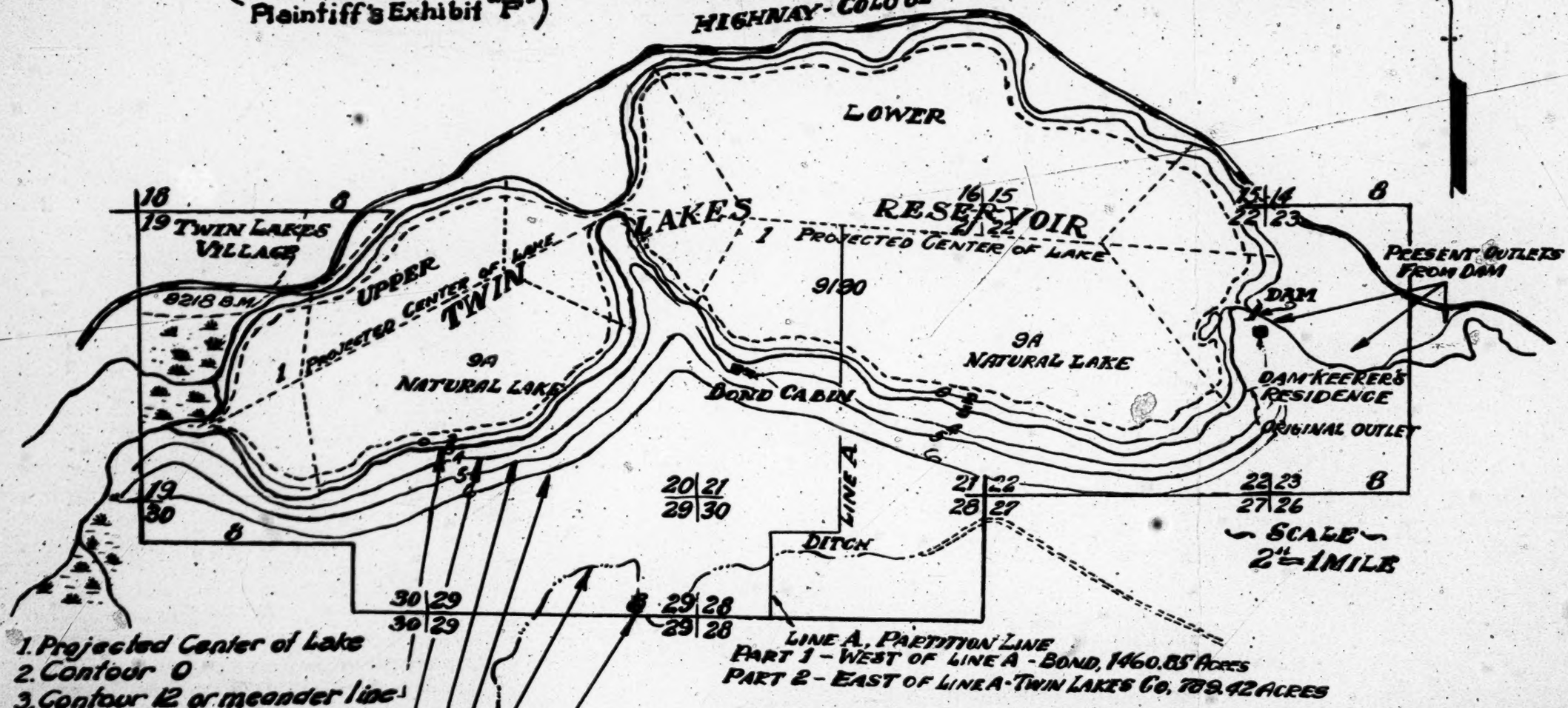
The trial court made Findings, (Judgment, paragraphs 9, 10 and 11, Pages 20 and 21, folios 232-237 Record and paragraphs 5 and 6, Page 36, folios 278-279) upon evidence adduced that the cotenancy property extended beyond said meander line into and upon the beds of said lakes and to the center or thread of the stream thereof. The trial court decreed partition in kind of all of the cotenancy property including that upon parts of the beds of the lakes, (Judg-

ment, Paragraph 1, Page 37, folio 289) all based upon a Commissioner's Report and entered final judgment thereon. Said defendants, in the trial court, respondents here, secured a Writ of Error from the Supreme Court of the State of Colorado.

Your Petitioner submits herewith on the following page, for illustration purposes only, a sketch map of his claims and the findings, decree and judgment of the trial court, as taken from page 12 of his Brief as defendant in error in the Supreme Court of Colorado.

SKETCH MAP

Illustrating Ownership claimed by Bond and so found by Trial Court.
(Basic Outline taken from United States Geological Survey of Colorado, Mt. Elbert, Quad.
Plaintiff's Exhibit "F")



1. Projected Center of Lake
2. Contour 0
3. Contour 12 or meander line
4. Contour 23
5. Contour 30
6. Contour 40
7. Ditch Line
8. Cotenancy Line

LINE A, PARTITION LINE
PART 1 - WEST OF LINE A - BOND, 1460.85 ACRES
PART 2 - EAST OF LINE A - TWIN LAKES CO. 789.42 ACRES

9. Areas, between contours
   a. Original natural lakes extended from center of lakes to contour 12
   b. Storage areas: (1) 0-12, included in original lake; (2) 12-23 Dexter Easement; (3) 23 to 30 (28.54 or 28.65) Bond Easement; (4) Lease reserve line Contour 40
   c. Cotenancy area approximately 2000 acres, plus pro rata share of beds of lakes

The Supreme Court of Colorado reversed the final judgment of the trial court for the reason that, so it stated in its opinion, the patents and selections of the state were limited to the meander line and did not extend beyond it, thus leaving the title to the beds of the lake undetermined although it did not appear that the United States is asserting any affirmative claim thereto, perhaps and seemingly because of its adherence to the Hardin vs. Jordan supra rule (See paragraph 3 of Petition for Rehearing, Annex No. 2.)

The Supreme Court of Colorado, also, and in the same opinion, specifically held that partition would NOT lie until the expiration of certain leases in 1971, one of which leases was from cotenant Twin Lakes Company to cotenant Bond, and included other property owned by said cotenant lessor Twin Lakes Company. Bond, in turn, executed a substantially identical lease, likewise expiring in 1971, to the Burgesses (not parties here), and assigned the lease of his cotenant Twin Lakes Company to the same Burgesses. Both of these leases, including the assignment of the Twin Lakes Company lease, were by their terms expressly assignable.

Reference to findings and rehearing.

Federal Question Raised Below

6. (f) Defendants below, respondents here, first raised the possibility of a Federal queston in the trial court in a certain Motion to Dismiss because of the absence of necessary parties, so it claimed, including the United States. See second unnumbered page of Vol. 3 of Record in No. 20005. The same question was raised several other times in the trial court, and, also, in the Supreme Court of Colorado in Cause No. 20777, and, too, in a separate and original proceeding in the nature of prohibition in the same court. The application for prohibition was denied and the case dismissed by the court sitting En Banc on May 3, 1962, by unreported minute order therein. Twin Lakes Reservoir and Canal Company vs. District Court, Case No. 20272.

Plaintiff below and this petitioner at all times asserted that the United States was not a necessary party and that

it could not be made a party to this proceeding by reason of its immunity, and alleged that the claims of the defendants below, respondents here, were so made with the knowledge of such immunity and for that reason, only. All such numerous efforts by Twin Lakes Company and its associates were denied. Your petitioner also as defendant in error in the Supreme Court of Colorado, in his Petition for a Rehearing, raised the question in Paragraph 2 thereof. See Annex 2 hereto.

Other Review

7. (g) Review of the judgment of a Federal Court is not sought here.

Argument

HARDIN VS. JORDAN

8. (h) The basis for the opinion and decision of the trial court was the decision of this court in Hardin vs. Jordan, (1891) 140 U.S. 371, 35 L. Ed. 428, 11 S. Ct. 808. That decision, we contend in its entirety has significance herein and is controlling on this Petition for a Writ of Certiorari. We limit ourselves to a quotation here of the Court's syllabus therein as follows:

> *Meander lines, effect of — grants of land bordering on tidewater — grants of public lands bounded on streams — common law in Illinois — fresh-water lakes and ponds belong to adjacent owners — Land Department cannot sell lands previously disposed of.*

"1. Meander lines along or near the margin of a stream or other body of water are run to ascertain the quantity of public land sold and are not boundary lines; the waters themselves constitute the real boundary.

"2. Grants of the government for lands bordering on tidewater extend only to high-water mark; the title to the shore and lands under water in front of lands so granted inures to the State within which they are situated.

"3. Grants of the government for lands bounded on

streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the State in which the lands lie.

"4. The common law is the law of Illinois as to the rights of riparian owners.

"5. By the common law, fresh-water lakes and ponds, except the great navigable lakes, belong to the owners of the soil adjacent, who own the soil usque ad filum aquce.

"6. The Land Department has no jurisdiction to transfer lands which are not at the time public property, having been previously disposed of; the question whether they have, or have not, been previously disposed of is a judicial question and not determinable by the executive department."

(No. 161.)

Argued Jan. 23, 26, 27, 1891. Decided May 11, 1891.

FINDINGS OF TRIAL COURT

(ii) The trial court made certain significant findings of fact and law upon the matters here involved that bring this case squarely under the Hardin vs. Jordan rule. Those findings with paragraph and page numbers of the Judgment, and folio numbers of the Record on Error, as certified by the Clerk of the Supreme Court and being transmitted and filed herein.

We think such findings of fact made by a trial court upon evidence presented to it here and now are binding as to such facts, including intention of parties and similar matters, upon courts of review in the absence of a new trial hereof.

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8. The cotenancy property was orignally obtained by patents from the United States to individuals or by selection from the United States by the State of Colorado under rights accruing to it by acts of Congress. The patents from the State of Colorado were to individuals.

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9. The original patents from the United States and the State of Colorado and the selection lists of said State contained no reservation of the rights or title of or to the United States or of or to the State of Colorado in or to the area extending into Twin Lakes beyond the meander line of Twin Lakes as surveyed as aforesaid, nor did the United States or the State of Colorado use said meander line as a boundary line of the tracts conveyed in and by said patents. It does not appear that the United States or the State of Colorado intended to use the original meander line as a boundary line of the lands patented; nor does it appear that

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the public officers, in making sales, did actually or by necessary implication make the meander line the boundary line in said patents. Under such circumstances, the general rule that the meander line is not the boundary line applies and under that rule, the patentees obtained title from the meander line on the various lots and tracts abutting Twin Lakes to the center of Twin Lakes.

10. All conveyances to the cotenancy property since the patents by the United States and the State of Colorado have used substantially the same descriptions as those used in

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the patents and none of said conveyances have contained a reservation of the area extending from the meander line inward to the lake, and none of said conveyances, affirmatively or otherwise, contain words indicating an intention to use said meander line as a boundary line, and said meander line has not been adopted as a boundary line in any conveyance in evidence in this case. The Court finds that the present cotenants have a fee title from the meander line on the various lots and tracts abutting Twin Lakes to the center of Twin Lakes.

11. All patents from the United States and the State of

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Colorado to individuals of the cotenancy property adjoining or abutting Twin Lakes were issued prior to any filings or use by the predecessors in interest of or by The Twin Lakes Reservoir and Canal Company of the area of Twin Lakes within the meander line or above said line as the same was originally surveyed, mapped and existed on the tracts constituting the cotenancy property. By such patents, the United States and the State of Colorado divested themselves of the fee title to the land lying in said Twin Lakes within said meander line and thereby the patentees and their successors, including plaintiff and defendant The Twin Lakes Reservoir and Canal Company acquired a valid existing

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right and vested interest in said area of Twin Lakes within said meander line.

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12. Any rights acquired or permits granted to the predecessors in interest of the defendant The Twin Lakes Reservoir and Canal Company were granted expressly "subject to all valid existing rights," and the said predecessors in interest of said defendant company thereby acquired no rights by said filings and order thereon in, to or upon the area of Twin Lakes within said meander line as previously patented to such individuals. Plaintiff and defendant The Twin Lakes Reservoir and Canal Company have succeeded

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to "all valid existing rights" in the bed and floor of Twin Lakes and the same are a part of the cotenancy property herein, subject, however, to the terms and conditions of the thereafter granted Dexter Easement and Bond Easement as described and defined in said easements and in this Findings of Fact, Conclusions of Law and Judgment.

23. Plaintiff is entitled in law and equity and has a right

to a partition of the cotenancy property, either in kind, or by sale, or otherwise, as in law and equity authorized and

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provided. Such partition should and shall be subject to the following:

a. The term and terms of the assignment of the lease by plaintiff from defendant The Twin Lakes Reservoir and Canal Company and the separate lease from plaintiff, each, to defendants William C. Burgess and Betty Gene Burgess.

c. The rights, privileges and obligations of plaintiff and defendant The Twin Lakes Reservoir and Canal

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Company in, under and by virtue of their various agreements in writing and in evidence in this cause, between plaintiff and said defendant under date of July 7, 1951, and being the following:

(1) Lease to Bond, Exhibit 1;

(2) Agreement, Exhibit 2;

AND THE COURT DOTH NOW STATE its conclusions of law as follows:

CONCLUSIONS OF LAW

1. Plaintiff and defendant The Twin Lakes Reservoir and Canal Company have an interest and are cotenants in the fee title to the cotenancy property hereinabove described, and plaintiff is entitled to and has a right, in law and equity,

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to have the fee title partitioned and divided in manner and

form as provided by law and as found, ascertained and determined herein.

2. The division and partition of the fee title to the cotenancy property should be made in kind, or by sale if partition cannot be made without manifest prejudice to the rights of any interested party or parties, or by a combination of both methods, as may be provided by law and in this Findings of Fact, Conclusions of Law and Judgment.

3. The division and partition to which the plaintiff is entitled in law and equity should be subject to the following:

a. The right, title and interest of defendants William C. Burgess and Betty Gene Burgess under and by

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virtue of the terms of the assignment by plaintiff of his lease dated July 7, 1951 from defendant The Twin Lakes Reservoir and Canal Company, and also of their rights, title and interest under the separate lease from plaintiff to them of the same date, all as herein expressly stated, found and adjudged.

5. Such rights as may have been acquired by defendant The Twin Lakes Reservoir and Canal Company and its predecessors in interest and title in, under and by virtue of its or their filings with a department or agency of the

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United States of America as herein mentioned, are junior and subject to the rights of plaintiff and defendant The Twin Lakes Reservoir and Canal Company, and of their predecessors in interest, under and by virtue of the various patents issued by the United States and the State of Colorado to and upon the cotenancy property as herein described.

6. The original meander line of Twin Lakes as originally

surveyed by and for the United States was not, nor was the same adopted as or intended to be the boundary line of the lots abutting Twin Lakes in the patents and conveyances thereof; and the rights, titles and interests of the cotenant

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parties in and to the cotenancy property extend from said meander line into the lakes and to the center or thread of the stream of said upper and lower Twin Lakes.

WHEREFORE, IT IS NOW ORDERED, ADJUDGED AND DECREED BY THE COURT as follows:

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1. The fee titles to the cotenancy property as described herein shall be partitioned and divided equally between plaintiff and defendant The Twin Lakes Reservoir and Canal Company in manner and form as provided by law, either in kind, or by sale, or by a combination of both methods, as may be authorized by law and as provided in this Findings of Fact, Conclusions of Law and Judgment.

(III) PETITION FOR REHEARING

The Petition For Rehearing to the Supreme Court of Colorado likewise, in its entirety, has significance here and the same is specifically referred to on this point, appended hereto as Annex 2, and expressly incorporated in this argument.

COLORADO SUPREME COURT OPINION

(iv) The Supreme Court of Colorado recognized the Hardin vs. Jordan rule in *Hanlon vs. Hobson*, 24 Colo. 285, 289, 51 Pac. 433, and in *Hartman vs. Tresise*, 36 Colo. 146, 84 Pac. 685.

Also see *Stewart vs. Lamm*, 132 Colo. 484, 489, 290 Pac. (2d) 223, where it is stated that

"It is well settled law that when a government grant is made which does not reserve a right or interest that would ordinarily pass by the rules of law, and the government does not act which indicates an intention to make such reservation, the grant includes all that would pass by it, as if it were a private grant. *Johnson v. Johnson,* 14 Ida. 561, 95 Pac. 499; *Middleton v. Pritchard,* 3 Scram. 510 (Ill.) *Hardin v. Jordan,* 140 U.S. 371.

The judgment of the trial court must be and it is affirmed."

That court in the instant case, however, recognized the Hardin vs. Jordan rule without expressly citing it, but after noting the two earlier Colorado cases mentioned immediately above, based its decision on what it claimed were certain exceptions to that rule. Those claimed exceptions were that Court's interpretation of the official map of the original governmental survey of 1876 and that Court's hindsight surmise, only, as to an unexpressed and nonexisting intention of the parties therefrom. The State Court's surmise therefrom was contrary to the Hardin v. Jordan rule, which the trial court expressly held to be applicable in the absence of "any reservation or restriction of terms", in the patent itself. No such reservation or restruction existed in any of the patents, Federal, State or the Selection List, involved here.

The Colorado Supreme Court also arbitrarily and incorrectly assumed that the projection of the lot lines from the meander line would be perpendicular and parallel to each other. Such unwarranted assumption disregards the rule that the projections in each instance shall converge at the center or thread of the stream of the lake in pie-shaped fashion. Some other cases have also held that the projection would be limited to the sections specifically mentioned in the patent. The pie-shaped fashion, either to the center or to the limits of the described sections is the rule universally applied in such cases. Such rule makes the State Court's assumption meaningless and bordering on the ridiculous.

A scholarly article upon the entire subject by Mr. Bade entitled "Titles, Points and Lines of Lakes and Streams", appears in 24 Minnesota Law Review, beginning on Page 305; see also Page 313.

The statement of the Colorado Supreme Court that the United States and the State of Colorado granted storage rights to Twin Lakes and its predecessors for the storage of water upon the private property of others is not true. The approval of the claim of a right of way was expressly made "subject to all valid existing rights".

Title to the beds of the lakes was vested in the patentee homesteaders of the Federal Government and other patentees of the State of Colorado. Those rights to the beds of the lakes became vested when the Federal Government granted all rights to the center or thread of the stream of the lake in the patents to homesteaders and in the selections made by the State of Colorado long prior to the Federal Right of Way Act of 1891 and by reason thereof such parts of such beds projected from the cotenancy lots ceased to be public domain and as such were not subject to the jurisdiction of the Department of Interior at the time of the filings for right of way or the approval of such filings.

The Hardin vs. Jordan case, as well as countless other such cases specifically so hold.

(V) HARDIN V. JORDAN FOLLOWED

The rule in Hardin vs. Jordan has been recognized and consistently applied by this Court, including all Federal Courts and many State Courts since its announcement, and it has been applied by the various governmental departments in issuing and construing patents of the United States to its citizens.

1 *Brewer-Elliott Oil and Gas Co. vs. United States*, 260 U.S. 77, 67 L. Ed. 140.

2 *United States vs. Holt State Bank*, 270 U.S. 40, 70 L. Ed. 465.

3 *United States vs. State of Utah*, 283 U.S. 64, 75 L. Ed. 844.

4 *United States vs. State of Oregon*, 295 U.S. 1, 79 L. Ed. 1267.

5 *Shively vs. Bowlby, et al.*, 152 U.S. 1, 38 L. Ed. 331.

A comparatively recent example of this appears in the following land decisions:

In re: William Erickson (1924)
50 Land Decisions 281.

In re: Grace E. Hiler (1956)
Plaintiff's Exhibit BB

Opinion by then Assistant and Acting Secretary of Interior, now United States District Judge, Hatfield Chilson, in No. A-27370, New Mexico No. 01960.

Overruling Hardin vs. Jordan, supra, will confuse, jeopardize and open to question all United States Patents as well as many state patents issued in reliance upon the ruling in that case, upon lands abutting inland natural non-navigable lakes.

As such it would also constitute a violation of the due process of law provisions of the Fifth and Section I of the Fourteenth Amendments of the United States Constitution.

(VI) SEMI-ARID WESTERN STATES

(vi) The Colorado Supreme Court seemed to suggest in a single sentence that the Hardin vs. Jordan rule might not be applicable in the arid western states, where the doctrine of prior appropriation of public waters in the streams (only) has restricted and limited the original conception of riparian rights flowing from the sic utere doctrine. Water rights are not here involved. This case has to do with the title to the land constituting the bed of the lakes, and not the water thereupon. Rights to the use of water in our western states are independent of the ownership of the land upon which the waters flow.

The Common Law of England "so far as the same is applicable and of a general nature" is by statute the common law of Colorado, the same as it is the common law of Illinois as applied by this court in Hardin vs. Jordan, 135-1-1 Colorado Revised Statutes, 1963, and 1953.

While the *Sic Utere Rule* does not apply to *water* in prior appropriation states, other riparian rights such as fisheries, etc., do, as specifically held in *Hartman vs. Tresise,* 36 Colo. 146, 84 Pac. 685, 4 L.R.A. N.S. 872.

(VII) RES JUDICATA

(vii) It may be, as we think it is, that the ruling of the State Supreme Court with reference to the beds of the lakes is not res judicata on that question here between the two cotenants in the absence of the United States as a party. This is certainly true of the State of Colorado who is the owner of shore line lands on the opposite shore from the cotenancy property. The Colorado Attorney General disclaimed any rights to the cotenancy property.

The fact that the Colorado Supreme Court ruling might be urged as res judicata in a later proceeding, such as condemnation, has persuaded this petitioner to question that ruling here and it has, in part, induced him to urge the granting of certiorari now and here.

(VIII) QUESTIONS NOT COVERED HERE

(viii) We refrain from presenting an argument upon the fourth and last points designated as Paragraph 3 c (iv) and under the title of "Questions Presented" for the reason that it is not now involved in the question of the granting of the Writ prayed for. That point will concern this Court only if the Writ is issued, and then only as incidental to the other questions. We think that, that point may be left for the future.

Other Opinions

9. (1) This case was before the Colorado Supreme Court in its No. 20005, where respondents here as plaintiffs

in error there unsuccessfully contended that the first order granting partition and appointing commissioners to make division was a final order. The Colorado Supreme Court there remanded the case for further proceedings which, in turn, resulted in the Final Judgment, so called, of the trial court and the review thereof in the instant case No. 20777. No other reference thereto is necessary here except to state that the record in No. 20005 is properly a part of the record in this case.

Final Judgment of Trial Court

10. (j) Pertinent provisions of the Final Judgment of the trial court were noted and quoted in 8 (g) Argument above, and no further comment under this heading is deemed necessary.

Conclusion

We request that a Writ of Certiorari issue herein.

Respectfully submitted,

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Annex 1: Pgs. 21-27 Inclusive

The TWIN LAKES RESERVOIR AND CANAL COMPANY, the Connecticut Mutual Life Insurance Company and the Colorado National Bank of Denver, Plaintiffs in Error,

v.

Eugene A. BOND, Defendant in Error.

No. 20777.

Supreme Court of Colorado.

En Banc.

April 5, 1965.

Rehearing Denied May 17, 1965.

Action to partition certain real estate. The District Court, Lake County, William H. Luby, J., rendered judgment granting relief, and the defendants brought error. The Supreme Court, Moore, J., held that agreement between cotenants of land lying on natural lakes whereby one parted with substantial cash consideration for exclusive and perpetual easement and further right to sell or lease all rights to government agencies up to date of expiration of lease precluded partition.

Judgment reversed.

1. Deeds ⇐112(2)

Where conveyance is made with reference to official map or plat, it becomes part of grant or source of reference in ascertaining intentions of parties.

2. Navigable Waters ⇐37(4)

Fee owners of lots on natural lakes did not have title to center of lakes where government survey meandered lakes and platted fractional lots on all sides, designating acreage contained to meander lines and where patents from which land was derived referred to and contained same lot numbers as official survey and disclosed such acreages for lots.

3. Partition ⇐22

Agreement made by cotenants not to partition may arise by implication, and where contract between them cannot be carried out in event of partition, then cotenant has no right of partition.

4. Partition ⇐22

Generally, partition will not be granted at suit of one in violation of his own agreement, since agreement operates as estoppel against right to partition.

5. Frauds, Statute of ⇐119(2)

Agreement within operation of rule that violator of agreement is not entitled to partition may be oral where it has been so far performed that to allow its repudiation would be tantamount to allowing commission of fraud.

6. Partition ⇐22

Agreement not to partition may be implied as well as express; and will readily be implied and enforced if such implication proves necessary to secure fulfilment of agreement between cotenants, or if granting of partition would destroy estate sought to be partitioned.

7. Partition ⇐22

Agreement between cotenants of land lying on natural lakes whereby one parted with substantial cash consideration for exclusive and perpetual easement and further right to sell or lease all rights to government agencies up to date of expiration of lease precluded partition.

Thulemeyer & Stewart, La Junta, Yegge, Hall & Shulenburg, Denver, for plaintiffs in error.

W. David McClain, Eugene A. Bond, Denver, for defendant in error.

MOORE, Justice.

We will refer to The Twin Lakes Reservoir and Canal Company as Twin Lakes in those instances in which the reference is to the company as distinguished from the other plaintiffs in error. Where all plaintiffs in error are equally affected they will be referred to as the defendants. The defendant in error will be referred to as the plaintiff or as Bond.

The action was commenced in the trial court by Bond who sought to partition certain real estate in eight sections of land in Lake County, Colorado. The case involves a substantial acreage lying under two natural lakes commonly known as Twin Lakes. It also involves other lands not bordering upon or in any way connected with the water in the lakes or the stream which empties into and flows out of them.

The water level of the two lakes was raised from time to time by the erection of a dam at or near the outlet of the lakes. Exclusive and perpetual easements for the storage of water were acquired over a period of many years by the predecessors of Twin Lakes, and also by Twin Lakes itself. These easements began at the meander line of the shores of the two lakes originally fixed as the "12 foot contour line." They covered the area from this line outward to the 23 foot contour line, then further to the 30 foot line and ultimately to a 40 foot contour line.

Twin Lakes and Bond are the owners of the property in dispute, as tenants in common, each interest being an undivided one-half of the whole. The title of the parties stems, in major part, from patents from the United States, and to a lesser area from selection by the State of Colorado pursuant to the Enabling Act and subsequent patents from the state. All the patents, whether from the federal government or the state, were issued with reference to an official government survey of Township 11. This survey was admitted in evidence and shows both the upper and lower lakes involved in this controversy. The survey became official by approval of the Surveyor General on March 31, 1877. Both the upper and lower lakes are irregular in shape, by which we mean that they cannot be described as being round, square, triangular or oval in general characteristics. The land abutting the lakes was platted and surveyed to the boundary of the lakes, and the meander lines of the lakes marked the inner boundaries of the numerous lots shown by the plat. The surveyor used lot numbers to identify the separate tracts.

The trial court, in ordering partition in kind of the lands involved in the action, found as follows:

> "Twin Lakes was originally two natural bodies of water collectively described as Twin Lakes and sometimes referred to as the upper and lower lakes. The cotenancy property extends into and upon the bed and floor of Twin Lakes from the meander line thereof on the lots and subdivisions abutting Twin Lakes, as the same were originally surveyed, mapped and designated by and for the United States and as approved by the Surveyor General under date of March 31, 1877, and of record in his office and in evidence in this cause as Defendants' Exhibit No. 6; and said property includes such areas of the bed and floor of said Twin Lakes from said meander line to the center or thread of Twin Lakes."

As a factual basis for that finding the trial court found:

> "The original patents from the United States and the State of Colorado and the selection lists of said State contained no reservation of the rights or title of or to the United States or of or to the State of Colorado in or to the area extending into Twin Lakes beyond the meander line of Twin Lakes as surveyed as aforesaid, nor did the United States or the State of Colorado use said meander line as a boundary line of the tracts conveyed in and by said patents. It does not appear that the United States or the State of Colorado intended to use the original meander line as a boundary line of the lands patented; nor does it appear that the public officers, in making sales, did actually or by necessary implication make the meander line the boundary line in said patents. Under such circumstances, the general rule that the meander line is not the boundary line

applies and under that rule, the patentees obtained title from the meander line on the various lots and tracts abutting Twin Lakes to the center of Twin Lakes."

Question to be Determined

Did the trial court err in decreeing that the plaintiff Bond and the defendant Twin Lakes were cotenants and joint owners of the lands to the center or thread of Twin Lakes, and in ordering a partition of the property?

The question is answered in the affirmative. We are well aware of the majority rule that where land is conveyed to the shore line of or along the line of a running stream, the grantee receives the fee title to the center thereof. It must not be overlooked, however, that most of those decisions are from states which recognize the doctrine of riparian ownership. We are also not unmindful of those early Colorado cases of Hanlon v. Hobson, 24 Colo. 284, 51 P. 433, 42 L.R.A. 502, and Hartman v. Tresise, 36 Colo. 146, 84 P. 685, 4 L.R.A., N.S., 872, which adhered to the general rule that when the tract of land granted is described as bounded by a nonnavigable stream, the middle or thread of the stream is the true boundary, unless the conveyance contains an express or implied reservation of the stream, or words limiting the boundaries to the bank.

[1, 2] The official map of the original government survey shows that every tract of land bordering on each of the lakes is shown by a lot number within certain sections. Each of these lots is of an irregular acreage of less than a full forty acres which is the usual surveyor's way of identifying lands within any given section. On each of these lots the acreage contained therein appears on the map.

The fallacy of the trial court's conclusion may be illustrated by reference to Exhibits 23 and 26. Exhibit 23 is a patent issued to one Moses Bruner. It conveys four separate lots, as numbered on the map, which border on the original meander line of the *west end of the upper Twin Lake*, and which were located in Section 19. Each of the lots is described on the map as containing fractional acreages. Exhibit 26 is a certified copy of a patent issued to Zeriah Smith. Part of the land therein conveyed is a lot which borders on the meander line of the *south shore* of the upper Twin Lake. As in all other instances where lots are shown on the official map, the irregular acreage is portrayed. If the lots to the west of upper Twin Lake convey to the middle of the lake, then the description of the lots coming in at right angles from the south would be a conveyance to the middle of the lake. It is obvious to anyone who may look at the official map that if the trial court's conclusion is correct the ground under water would be conveyed to at least two different persons. This situation prevails all around both lakes, and the construction placed upon the patents by the trial court creates a hopeless conflict of ownership arising from patents issued to separate grantees all around the Twin Lakes.

It is not to be presumed that the government officials created any such havoc by the various patents all around the Twin Lakes. That the government itself did not so construe those patents is evident from its action in accepting the application of the predecessors of Twin Lakes for storage rights, and when, in 1923, it later certified that the rights of Twin Lakes to store water had been earned.

The admitted fact that the United States and the State of Colorado granted storage rights to Twin Lakes and its predecessors for the storage of water in the upper and lower lakes disproves the conclusion that they had parted with title "to the center of the lake" when they issued patents to lots showing the meander line as a boundary. In Smith v. Town of Fowler, 138 Colo. 359, 333 P.2d 1034, this court reaffirmed the middle of the stream rule by holding that where the words, "along," "to," or "bounded by" a water course are used to describe a grant of land, the grant extends to the thread of the stream, unless

a contrary intention of the parties appears; but that where a conveyance is made with reference to an official map or plat, the map or plat becomes a part of the grant, or a source of reference in ascertaining the real intention of the parties. In that case this court said:

"Where a conveyance is made with reference to an official map or plat, the map or plat becomes a part of the grant. Thus in the case of Wisconsin Realty Co. v. Lull, 1922, 177 Wis. 53, 187 N. W. 978, [980], the Supreme Court of Wisconsin considered a very similar situation to that before us. There, as here, the government survey meandered a river and platted fractional lots in conformity with such line. The description in the conveyance involved read as follows: 'Lot 1 in section 21 being all the land in said section north of the Flambeau river and containing 65.48 acres more or less according to the United States government survey.' A subsequent survey showed the river to be a considerable distance south of that shown on the official plat. It was therefore claimed that all of the land in Section 21 lying north of the Flambeau River as it actually existed belonged to the grantee. In resolving the question before it the Wisconsin court said:

" 'A construction of the entire conveyance satisfies us that the meander lines as designated on the plat and in the original field notes must be held to be the actual boundary of the land conveyed for the following reasons:

" 'The conveyance contains an express reference to this particular governmental survey;

" 'It contains an express reference to a particular lot platted and represented on such survey;

" 'It contains a specific designation as to the acreage contained.

" 'The difference between the designated acreage in the conveyance of 65.48 acres claimed and the 160 acres claimed, if the boundary should be limited by the two quarter lines, or the 173 acres if to the actual river, is in either event so grossly excessive as to indicate, in connection with the purchase price, that neither of the larger quantities could have been within the intention of the parties.

" 'Express reference to the United States government survey makes the plat as recorded in pursuance to the field notes, if not a substantial part of the deed, at least an appropriate source of reference in so ascertaining the real intention.' "

In the instant case the government survey meandered two lakes and platted fractional lots on all sides of those lakes and in between the lakes. Each lot shown on the survey designates and discloses the acreage contained therein. The patents to the lands bordering on and all the way around and between both of the Twin Lakes refer to the land and convey the same by lot numbers according to the official survey, and in every case the lot as numbered on the survey discloses the acreage of each lot. The difference between the acreage as shown on the lots and the acreages claimed by Bond are very material. The increase in acreage, if ownership is carried to the center of the lake or to the "thread of the stream," is so great as to negate the claim.

From the date of the original patents, subsequent owners of the property described therein have granted easements for storage of additional water to Twin Lakes, and invariably started or ended the description of the land over which the easements were granted at the original high water meander line of the natural lakes. This significant fact indicates clearly that at the time of the granting of those easements the grantor did not claim ownership of the bottom of the lake to the center thereof, or to the "thread of the stream." For over sixty years no grantee in any patent, nor any successor in interest, claimed ownership to any portion of the land under the water of the lakes.

The United States, after executing patents to individual owners as above outlined, granted to Twin Lakes or its predecessors the right to use that land for the storage of water as did also the State of Colorado by virtue of other filings made with the state engineer. If those rights of storage were inconsistent with or contrary to the rights of the patentees, it behooved them to take some action to protect their rights.

We pass now to consideration of another important phase of this controversy. In 1950 Bond brought an action against Twin Lakes claiming damages for trespass by the over-flowing of water on the land area between the 23 foot contour and the 28.65 foot contour levels. Bond also sought injunctive relief. Before final disposition was made by the court in that action, it was dismissed (July 28, 1951) on stipulation of the parties. The dismissal was with prejudice.

[3] The agreements upon which the stipulation for dismissal of that action was based were generally as follows: Bond conveyed an easement to Twin Lakes on parts of the land involved in that litigation for the storage of water. He received as consideration the sum of $25,000 which ostensibly put an end to the dispute raised in the pending case. In addition to ending that dispute, and as the inducing cause thereof, Twin Lakes and Bond entered into a series of transactions whereby they defined new rights and interests in the entire tract of property held by them as cotenants. They expressly provided by separate agreement that the series of transactions was intended to "compromise and settle their differences arising out of the joint ownership of the property." By these documents Bond not only received the $25,000 but acquired most of the interest in land which Twin Lakes owned in the Village of Twin Lakes for the stated consideration of $100.00. Twin Lakes gave Bond a lease on its interest in the remainder of all the property involved herein. The term of that lease was for 20 years. In that lease Bond agreed that Twin Lakes could use or sell to a government agency, at any time during the term of the lease, all of the Company's interest in property lying below the 40 foot contour level. The term of the lease was to expire July 7, 1971. Any meaningful construction of the word "beneath" as therein used could only mean the area between the 40 foot contour line and the meander line of the original Twin Lakes. A partition in kind of the property as ordered by the trial court would defeat entirely the right of Twin Lakes to sell and to use that property "at any time during the term of the lease" executed by Bond. An agreement made by cotenants not to partition may arise by implication, and where a contract between them cannot be carried out in event of partition, then a cotenant has no right of partition.

In McIntire v. Midwest Theatres Company, 88 Colo. 559, 298 P. 959, there was a lease on a building, owned as cotenants by McIntire and Midwest Theatres Company, under which the company leased the interest of McIntire. The company sought partition. In that case this court said:

> "Counsel for McIntire say that the company is, by its 1924 contract, estopped to demand partition, and that the court was without power to enter such a decree. On the first proposition they cite 47 C.J. §§ 130 to 132, p. 321, and on the second the same volume, section 532, p. 482, and section 932, p. 613. They further insist that partition is, under the circumstances here disclosed, contrary to equity and good conscience.
>
> "The company stands upon the general rule that a tenant in common is entitled to partition, says the answer is a plea in abatement until the expiration of the lease, and cites section 5149, C.L.1921, prohibiting that plea in a partition suit.
>
> "The usual rule is as stated by the company. The sole question here is its applicability. Whatever may be said of the authorities cited, the simple fact is that there is nothing inalienable

about this right of partition. A tenant in common may contract it away, and this company has unquestionably done so. It agreed to pay McIntire $265 a month until May 1, 1932. It secured those payments by a mortgage on the leased premises. It now seeks, by the simple expedient of partition, to release that mortgage and evade those payments, unless McIntire purchases at the sale. Of course it cannot thus escape its obligation or force McIntire into additional expenditures to protect his contract."

In Arnold v. Arnold, 308 Ill. 365, 139 N.E. 592, the Supreme Court of Illinois has this to say of a similar situation:

"It has been said in general terms that an adult tenant in common has an absolute right to partition (citing authority); but it has been in cases where there was neither an equitable nor legal objection to the exercise of the right, and partition was in accordance with the principles governing courts of equity. Wherever any interest inconsistent with partition has been involved, the general rule has always been qualified by the statement that equity will not award partition at the suit of one in violation of his own agreement, or in violation of a condition or restriction imposed upon the estate by one from whom he claims, or where partition would be contrary to equitable principles. Partition will not be awarded in a court of equity, where there has been an agreement either not to partition, or where the agreement is such that it is necessary to secure the fulfillment of the agreement that there should not be a partition. Such an agreement may be verbal, if it has been acted upon, and it need not be expressed, but will be readily implied, and enforced, if necessary to the protection of the parties. Martin v. Martin, 170 Ill. 639, 48 N.E. 924, 62 Am.St.Rep. 411; Bissell v. Peirce, 184 Ill. 60, 56 N.E. 374; Ingraham v. Mariner, 194 Ill. 269, 62 N.E. 609; Seals v. Treatch, 282 Ill. 167, 118 N.E. 422; Hill v. Reno, supra [112 Ill. 154]."

In Carolina Mineral Company v. Young, 220 N.C. 287, 17 S.E.2d 119, 151 A.L.R. 383, the rule of estoppel by implied agreement arising from an existing lease between the cotenants was recognized and applied. McIntire v. Midwest Theatres Company, supra, was discussed at length and the rule there applied was approved. This court has repeatedly recognized the doctrine of estoppel in pais, even to the point of decreeing that it may effect a waiver of statutory and constitutional rights.

In Johnson v. Neel, 123 Colo. 377, 229 P.2d 939, with reference to the doctrine of estoppel in pais, this court said:

"We are of the opinion that under the peculiar facts of this case the doctrine of estoppel in pais is applicable and controlling. This doctrine is founded upon principles of fair dealing and is designed to aid the law in the administration of justice where without its aid injustice might result. In 19 American Jurisprudence page 640, we find the following statement: 'Generally speaking, however, equitable estoppel is a rule of justice which in its proper field prevails over all other rules.' The doctrine of equitable estoppel has been invoked to cut off rights or privileges conferred by statute, and constitutional rights may be effectively waived by conduct consisting of action or failure to act. Munsell v. People, 122 Colo. 420, 222 P.2d 615; Kalloch v. Elward, 118 Me., 346, 108 A. 256, [258], 8 A.L.R. 750; Wilson v. Philadelphia School District, 328 Pa. 225, 195 A. 90, 113 A.L.R. 1401. 'A statute cannot stand in the way of waiver or equitable estoppel when the facts demand their application in the interest of justice and right.' Kalloch v. Elward, supra."

See also Sanger v. Larson Construction Co., 126 Colo. 479, 251 P.2d 930; Piz v. Housing Authority, 132 Colo. 457, 289 P.2d 905;

Mabray v. Williams, 132 Colo. 523, 291 P.2d 677.

[4-6] In the case at bar Twin Lakes parted with a substantial cash consideration and other of its properties for an exclusive and perpetual easement from the 30 foot contour line, with the assurance of Bond that during the period of the lease it would not be deprived of an easement from the 40 foot contour towards the original Twin Lakes meander line. Twin Lakes was further granted the right of sale or lease of all these rights to a government agency up to the date of the expiration of the lease in 1971. The full enjoyment by Twin Lakes of these contractual rights cannot be minimized or defeated by partition. In 68 C.J.S. Partition § 44, we note the following cogent language:

> "The general rule is well settled that partition will not be granted at the suit of one in violation of his own agreement, since the agreement operates as an estoppel against the right to partition. An agreement within the operation of this rule may be oral where it has been so far performed that to allow its repudiation would be tantamount to allowing the commission of a fraud, but not otherwise. The agreement not to partition may be implied as well as express; and will be readily implied and enforced if such implication proves necessary to secure a fulfillment of an agreement between the cotenants, or if the granting of partition would destroy the estate sought to be partitioned. * * *"

In Nagel v. Kitchen, 381 Ill. 178, 44 N.E. 2d 853, we find the following pertinent language:

> "Defendants contend that since plaintiff joined in the execution of the leases covering these various properties it amounted to an implied agreement not to partition the lands during the period of the leases. An agreement not to partition need not be expressed and may be implied. It is settled law that if it appears the tenants in common of a tract of land have formulated plans and entered into agreements in reference to the management of the common property and the plans and agreements are of such a character that to grant partition would be to destroy the mutual agreement of the parties, then an agreement not to partition will be implied. Whitaker v. Scherrer, 313 Ill. 473, 145 N.E. 177. * * *"

[7] By the terms of a lease executed by the Company and Bond as part of the July 7, 1951 compromise, Bond was given full and exclusive possession of all the lands owned in common by the two of them for 20 years for a nominal consideration of $10.00, subject only to the easements conveyed to the Company for reservoir purposes. That this lease to Bond was of considerable value is evidenced by the fact that he has since assigned that lease to others for a rental of $3,000.00 per annum. There was ample consideration for Bond's agreement. Partition in kind now would destroy that right, and Twin Lakes would have something different to sell than that for which it had contracted with Bond. Partition by sale would force Twin Lakes to purchase back those rights in event of sale. The condition of the title with the lease thereon would seriously impede the procurance of competitive bidding in the event of partition by sale.

It follows from the foregoing that the judgment of the trial court, decreeing a partition of the property in dispute, was erroneous, and it accordingly is reversed.

SCHAUER, J., not participating.

Annex 2: Pgs. 28-32 Inclusive

Petition For Rehearing By Defendant In Error Bond. (Omitting Title Page)

Defendant in error Bond petitions the Court for a rehearing herein and states the points overlooked and misapplied by this Court in its en banc opinion written by Mr. Justice Moore, as follows:

1. The titles to the beds of the Lakes are immaterial and irrelevant here and now if the two cotenants lost or suspended their rights to partition, by either sale or division in kind, by the lease or other transactions, as the opinion of the Court specifically held; and such part of such opinion with reference to such beds was unnecessary, improvident, advisory and obiter, and should now be withdrawn, and another opinion expressly limited to the effect of the lease for the remainder of its term substituted, although the partition in kind here was made expressly subject to the terms of said lease.

2. The opinion is a construction of Acts of Congress "in which and where is drawn in question the validity" and previous constructions "of a statute of the United States" relating to its patents in violation of previous constructions thereof by the Supreme Court of the United States (Hardin vs. Jordan and its numerous descendants), and not heretofore questioned by the courts of the arid western states as contrary to the riparian rights doctrine under the prior appropriation principles adopted by those states. The administrative agencies of the United States have followed the Hardin vs. Jordan doctrine since its adoption in issuing patents.

3. The opinion left the title to the beds of the Lakes in nimbus and undetermined unless the Court meant to hold, and it did not specifically so say, that the title thereto remains in the United States, notwithstanding the mentioned rulings of the courts otherwise.

4. The extensions into the Lakes from the meander lines

need not have been and were not ruled by the trial court to be perpendicular from said meander lines, as the opinion states on page 6, but could have been, and were ruled to be extensions to "the center or thread of Twin Lakes," (Judgment, quoted on page 6 of opinion); in other words, in pie-shaped fashion, although some other courts have held that such extension, even in a pie-shaped fashion, may be confined to the sections or other legal subdivisions expressly designated in the patents or conveyances. The latter is a complete answer to the charge of disparity.

5. Neither the United States, nor the State of Colorado, "granted storage rights to Twin Lakes and its predecessors for the storage of water in the upper and lower lakes," as incorrectly stated in the opinion on page 7 thereof. Nor did the letter of the Commissioner of the Land Office state that "compliance had been made with the terms of the Federal Act of 1891, and that a right-of-way for reservoir purposes had been earned, by it upon the beds of Twin Lakes" as *mis*-stated in the opening brief of our adversary on page 8. (See Exhibit 23, Folio 1026).

6. The filing of the map in 1896 and the approval of such filing on May 18, 1897, as follows: "Approved subject to all valid existing rights," and the later 1923 certificate as follows: "The *evidence* of *constructions* (upon *non-cotenancy property)* is considered satisfactory and the easement (on public domain only under the 1891 Act) is earned," were both subsequent to the patents and selections, as well as the Act of 1891, and as such could not control or affect, by construction or otherwise, the "valid existing rights" already vested in such patentees, and the State of Colorado. (Our Answer Brief, pages 45 et seq.)

7. The two exceptions to the general rule of "to the center or thread" doctrine, applied in the cited Fowler case, was expressly found by the trial court from evidence adduced to be non-existent and not applicable to the facts of this case, and as such findings of fact are binding upon this Court. (Opinion, page 4. Judgment, Par. 9, Fol. 232, Appendix.)

8. The Colorado McIntyre Theatre and the North Carolina Mineral cases, cited in the opinion, are totally inapplicable here. Each of these cases involved a *sale*, and not a partition *in kind*, as does this case. The plaintiffs in each of the cited cases sought to escape by a *sale* the *obligations* of a mortgage in the first case and the obligations of development of a mine in the second. Justice Burke properly said: "It cannot thus escape its obligations." Here, Bond sought no escape, and Twin Lakes was assured of an escape in the event of a restricted sale or use of its particular half of the actual patented reservoir area upon the express terms of the exclusion of such area so sold, or actually used from the provisions of the lease.

9. It was specifically found here by the Commission as well as the trial court that partition in kind could "be made without manifest prejudice to the rights of any interested party," and such finding of fact and partition in kind thus became a finding of fact and as such binding on this Court here, and is not separable here and may not be disturbed by this Court under established law except by a remand with directions to appoint a new Commission.

10. The partition here was expressly subject to all easements including the Dexter and Bond easements and the easements of the lease which was "expressly limited in such a way as to in nowise interfere with the maintenance and operation of said reservoir for reservoir purposes and the conveying and storage of *transmountain diversion water*, including all * * * dams, structures," etc. (Burgess lease, Exhibit 1).

11. Water rights are not here involved. Fee title to land is. An easement to flow or store water does not of itself create a fee title to the land used for that purpose, whether riparian or otherwise. It is still but an easement for flowage or storage and the land owner is entitled to compensation

for such use and easement and may not be deprived of just compensation therefor under the Constitution.

12. Damage caused by transmountain diversion, as also here involved, to riparian and other owners is recoverable. (Twin Lakes Reservoir and Canal Company vs. Sill, 104 Colo. 215, 89 P. (2d) 1012).

13. The judgment of the trial court did not deprive Twin Lakes of any of its various "easement(s)" either above or below the meander line, nor of its "full enjoyment * * * of its contractural rights" under the 1951 transactions, nor were they "minimized or defeated by partition" (Opinion, page 15); "Bond was given full, (but not necessarily), exclusive possession of all lands owned in common" *plus* other separately owned Twin Lakes lands. All were subject to all easements and rights for "reservoir purposes," (Opinion, page 16); "Partition in kind now would NOT "destroy those rights," nor would Twin Lakes "have something different to sell than that for which it had contracted with Bond, nor would it force Twin Lakes to purchase back (any of) those rights in the event of sale," nor would the lease "impede" seriously or otherwise "the procurance of competitive bidding * * * by sale," which was also not ordered, (Opinion, page 17). The partition in kind was expressly made subject to those detailed rights as enumerated in the Judgment (Final) on page 48 of Twin Lakes' Appendix to its opening brief.

14. The "principles of fair dealing" and "the doctrine of estoppel in pais" are equally applicable to both parties here and the opinion announced fails to apply each of them to Twin Lakes. It misapplied both of them against this petitioner to the great profits of the adjudicated trespasser and to the grievous injury and great damage of petitioner herein.

WHEREFORE, petitioner prays that the original opinion be withdrawn and a rehearing granted, and, perhaps, a re-argument ordered, and that this Court grant the relief requested by petitioner Bond in his Answer Brief, OR ex-

pressly limit the effect of the opinion to this Court's precise definition of the exact effect of the lease or other 1951 transactions.

W. David McClain

and

Eugene A. Bond

Attorneys for Petitioner for Rehearing